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Publication of the Acts: Problems and Prospects (can. 1598)

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INTRODUCTION

More than ever before, people worldwide are becoming incresingly conscious of their personal dignity, justice and rights. They leave no stone unturned to claim and defend their rights. The growing awareness about fundamental rights with its subsequent reflection on the legal and procedural guarantees of the subjective rights is commendably significant. This awareness is found not only in civil society, but also among Christ's faithful, in particular, in the judicial system of the Church. Especially, in the instructional/probative phase of the trial of the marriage nullity cases, the procedural rights, guaranteeing their defence is of paramount importance for various motives. One of these principal motives of the instructional phase is to collect the proof by various means[1] in order to arrive at moral certitude (*certitudo moralis*) *vis-à-vis* the case in contention. After having collected the proof, the law demands that the judge publishes the acts of the case to the parties in the trial (can. 1598, *DC*[2] artt. 229-

[1] Declaration of the parties (cann. 1530-1538), documents (can. 1539-1546), witnesses and their testimony (cann. 1547-1573), experts and their reports (cann. 1574-1581).

[2] PONTIFICIUM CONSILIUM DE LEGUM TEXTIBUS, Instruction to be Observed by Diocesan and Interdiocesan Tribunals in Handling Causes of the Nullity of Marriage *Dignitas connubii* (25 January 2005), (Vatican City: Libreria Editrice Vaticana, 2005). (*DC* = *Dignitas Connubii*).

236) since it regards the salus animarum.[3] In fact, there are two stages in marriage nullity trials at which the law calls for publication: the first stage is the publication of the acts, while the second is the publication of the sentence (cann. 1614-1615; *DC* artt. 257-258). This article concerns the first type, i.e., the publication of the acts which occurs at the end of the instructional/probative phase of the trial, just before the case is formally concluded (can. 1599; *DC* art. 237) and then discussed (cann. 1601-1603; *DC* artt. 240, 242-243).[4]

Nevertheless, the canonical provision for publication of the acts, which is inevitable in the trial, is not without its own intricacies and delicacies, since it can give rise to various other serious problems, even leading to civil action, defamation of character etc. On the one hand, acts have to be published to protect the right of defence of the parties; on the other hand, the confidentiality and secrecy of the testimonies of the witnesses and declarations of the parties have to be discreetly maintained by the judge. Consequently, drawing a thin and fine line between the canonically significant need for publication in order to protect the right of defence and the aforementioned problems or secrecy has always been a bone of contention in various tribunals and the judges. Several Rotal sentences and canonical literature have always attempted to resolve this problematic issue. The *status quaestionis* of this article is to analyze the significance of the publication of the acts, the serious problems pertaining to it and to propose possible solutions so that the right of defence remains intact.

1 THE MEANING OF TERM 'PUBLICATION OF THE ACTS'

Before the theme of the study is delved into, it is of utmost importance that we understand the basic concepts pertaining to the theme and its evolution in order to have clear background knowledge. Such clarity of knowledge is instrumental in meeting the aims of this study.

[3] E.B.O. Okonkwo, *L'istruzione della causa di nullità matrimoniale fra il diritto e la prasi giudiziale*, (Vatican City: Urbaniana University Press, 2020), 152.

[4] Merlin Rengith Ambrose, *The Right of Defence. An Essential Element in the Marriage Nullity Process*, Thesis ad Doctoratum in Iure Canonico Consequendum, (Vatican City: Pontifical Urban University, 2019), 137.

Publication of the acts involves granting to the parties and their advocates, permission to inspect the acts of the process which are not yet known to them. The publication of the acts takes place by a decree of the judge who, after collecting the proofs, allow the parties and their advocates, under the penalty of nullity, to examine the acts, which are still unknown to them.[5] Therefore, it concedes to the parties the right to inspect the evidence/proofs gathered during the instruction of the case. Such provision for the publication, enshrined in can. 1598, is strictly linked with the essence of the process, i.e., with the principle of *contradictorium*[6] and the right of defence.[7] The Rotal Jurisprudence considers the publication of the acts as a concession of right of defence and *contradictorium* which are a substantial element in the process for the declaration of marriage nullity.[8] The right of defence demands by its very nature the concrete possibility of knowing the acts presented both by the opposing party and *ex officio* so that the other party can present his/her defence.[9] However, the obligation to publish the acts does not bring the material of the case into the public domain in the sense of giving everyone access to it, but rather pertains only to those involved in the case: the parties, advocates and the tribunal personnel.[10] In a marriage nullity case, the right of defence signifies the right

[5] For an analysis of this phase of the trial: cf. C. Izzi, "Publicación de las actas procesales", in Instituto Martín De Azpilcueta – Facultad De Derecho Canónico (eds), *Diccionario general de derecho canónico*, Vol. 6, (Pamplona: Ediciones Universidad de Navarra, 2012), 655-657.

[6] It is difficult to translate the term *contradictorium* accurately in English and to find an adequate term in common law tradition that corresponds to it. The function of the *contradictorium* in canon law is similar to the procedural function of "due process of law" in the common law of the Anglo-American legal tradition.

[7] Cf. Z. Grocholewski, "Guiding Principles of Book VII of the Code of Canon Law", in *Forum* 10 (1991): 85.

[8] *Coram* Burke, 23 July 1991, *RRDecr.*, Vol. 9 (1991): 112, n. 7: "Absque enim publicatione actorum ad normam iuris, elementum essentiale controversiae deest, nempe possibilitas contradicendi: id quod comportat gravem violationem iuris defensionis partium, ideoque, etiam ex norma can. 1620, n. 7, insanabilem sententiae nullitatem"; *Coram* Ragni, 19 October 1993, *RRDecr.*, Vol. 11 (1993): 164, n. 7.

[9] Cf. D.D. Price, "Law at the Service of Truth and Justice: An Analysis of Pope John Paul II's Rotal Allocutions", in *The Jurist* 53 (1993): 179.

[10] Cf. G. Giattino, *Pubblicità e segreto tra diritto di difesa e protezione dei valori communitari*

to defend one's proper status. To do so, he/she requires the knowledge of the acts. The requirement is so important that can. 1598 §1 enumerates the need for inspection of the acts which implies the publication of the acts. It is incorporated in *DC* art. 229. Therefore, publication should mean the opportunity given to the parties and their advocates to examine the acts, which have been assembled in the course of the proceedings. This provision is central to the right of defence.[11]

2 ORIGIN AND THE *SCHEMAE* DEVELOPMENT OF CAN. 1598

The canonical provision for the publication of the acts did not come into existence in the field of ecclesiastical laws all of a sudden. Rather, it has gradually evolved throughout the ages from the needs to protect the right of the parties to defend themselves. It is, therefore, opportune to shed light on the evolution of this particular provision.

2.1 Publication of the Acts in *CIC* 1917

In the middle ages, when the parties in contentious cases were always permitted to be present at the hearing of witnesses,[12] there was no need for the publication of the acts. It is very clear from the *Decretals* that the contentious trial of the middle ages required that the witnesses be not heard unless the parties were invited to be present at the hearing.[13] But when the proceedings began to be held secretly (*in camera*), with the parties being

nel processo matrimoniale canonico, (Roma: Pontificia Università Laterense, 1998), 130-134; N. Capponi, "I principi della pubblicità e della parità delle parti in giudizio nel nuovo processo contenzioso canonico in genere e nel processo matrimoniale in specie", in *Il diritto Ecclesiastico* 95 (1984): 154-175; V. Turchi, "Pubblicità e segretezza", in P.A. Bonnet – C. Gullo (eds), *Il giudice di nullità matrimoniale dopo l'instruzione 'Dignitas Connubii'* (Studi Giuridici 75), (Vatican City: Libreria Editrice Vaticana, 2007), 285-311.

[11] Cf. *Communicationes* 16 (1984): 68. The drafting Commission specifically indicated that the publication of the acts was "intimately connected" with the right of defence.

[12] Cf. X. II, 20, 2 and 41 in Friedberg, II, Coll. 315, 333.

[13] *Ibid.* When the both parties were present for the questioning of either party or the witnesses, there was no need to provide for the publication of the acts of the case. The identity of the person testifying and the content of the testimony were known to both parties. They already had sufficient information to prepare a defence either by contradicting the content of what was said or by impugning the credibility of the witnesses.

absent during the hearing of the witnesses, the necessity of publication arose as a corollary.[14] Can. 1858 of *CIC* 1917 states, "before the discussion of the case and sentence, all the evidence that is in the acts and that till then has remained secret must be published."[15] Can. 1859 of *CIC* 1917 states, "if the faculty has been granted to the parties and their advocates to inspect the procedural acts or to petition a copy of them, it is understood that publication of the process has been done."[16] It is carried out in order that the parties become acquainted with the new proofs and then defend themselves, if need be. The canon then states that this was understood as the publication of the process. Can. 1681 §2 of *CIC* 1917 prescribes:

> If he considers that new evidence should be admitted, the judge will decide this, having heard the other party, to whom he will grant an appropriate time to study the new evidence and to defend himself; otherwise, the trial is considered of no moment.[17]

In fact, knowing an adversary's proof is essential in providing an opportunity for the preparation of a valid defence. This is hardly possible without the proof being made known.[18] It provides an opportunity for the defence. Therefore, it was obvious that there was no explicit mention of the term "right of defence" in these canons of *CIC* 1917 which speak of the publication of the acts.

[14] Cf. F. Wanenmacher, *Canonical Evidence in Marriage Cases*, (Philadelphia: Dolphin Press, 1935), 142.

[15] Can. 1858 of *CIC* 1917: "Ante causae discussionem et sententiam omnes probationes quae sunt in actis et quae adhuc secretae permanserunt, sunt publicandae."

[16] Can. 1859 of *CIC* 1917: "Concessa partibus earumque advocatis facultate acta processualia inspiciendi petendique eorum exemplar, intelliguntur facta publicatio processus."

[17] Can. 1861 §2 of *CIC* 1917: "Si novas probationes admittendas censeat, id decernat iudex, audita altera parte, cui congruum tempus concedat ut novas probationes cognoscere et se defendere possit; aliter iudicium nullius est momenti."

[18] It is significant that can. 1861 §2 has added the words "probationes cognoscere" to the otherwise merely repeated text of can. 27 §3 of Lex Propria Romanae Rotae et Signaturae Apostolicae (29 June 1908), in *AAS* 1 (1909): 20-35: "debet congruum tempus alteri parti concedere ut super iisdem respondere possit. Aliter nullum erit iudicium"; Apostolicum Rotae Romane Tribunal, Bonaeren, *Remotionis* (5 April 1916), in *AAS* 9 (1917): 92.

2.2 The 1976 *Schema*

On 25 January 1959, in the Basilica of St. Paul Outside the Walls, Pope John XXIII announced his intention to convoke an ecumenical council and the revision of the Code of Canon Law. After a lengthy hiatus of few years, Pope John Paul II formally inaugurated the work of the Code Commission on 20 November 1965.

The Commission worked hard to carry out several changes and drafted a *schema* on procedural laws on 3 November 1976. The content of the above-mentioned three canons of *CIC* 1917 was made as a single can. 257[19] of the 1976 *schema*.[20]

> Can. 257 of the schema of 1976 prescribed the following:
>
> Can. 257, §1 Before the discussion of the case, all the proofs which are in the acts and remained secret must, under the pain of nullity, be published.
>
> §2 The publication of the process is done by conceding permission to the parties and their advocates to inspect all judicial acts and to petition for a copy of them.[21]

This can. 257 of 1976 draft met with severe criticisms for many reasons[22] and there was an excessive negative reaction to the use of

[19] Cf. Pontificia Commissio Codici Iuris Canonici Recognoscendo, *Schema canonum de modo procedendi pro tutela iurium seu de processibus*, (Vatican City: Typis Polyglottis Vaticanis, 1976), 57: Can. 257 of 1976 *Schema*. Can. 257 §1: "Ante causae discussionem omnes probationes quae sunt in actis et secretae permanserunt, sunt, sub poena nullitatis, publicandae; §2: Publicatio processus fit concessa partibus earumque advocatis licentia acta iudicialia inspiciendi petendique eorum exemplar"; *Communicationes* 11 (1979): 134-135.

[20] This was entirely the product of the consultative *Coetus* that dealt with *De processibus*.

[21] *Communicationes* 11 (1979): 134: Can. 257, §1. Ante causae discussionem omnes probationes quae sunt in actis et secretae permanserunt, sunt, sub poena nullitatis, publicandae; cf. J.P. Beal, "Publish or Perish: Transparency and the Marriage Nullity Process", in *CLSA Proceedings of the Seventy-Fifth Annual Convention*, (Washington: CLSA, 2014), 61.

§2. Publicatio processus fit concessa partibus earumque advocatis licentia acta iudicialia inspiciendi petendique eorum exemplar.

[22] Cf. D.A. Smilanic, *The Publication of the Acts: Canon 1598 §1*, (Romae: Pontificia Universitas Gregoriana, 2001), 8: First, this content of the canon could leave everyone involved in the process open to civil prosecution; secondly, it could hinder the collection of essential information in the instruction of the case by deterring possible witnesses; thirdly, the right of defence is not an absolute

the proposed canon in matrimonial trials.[23] Both Canon Law Society of Australia and New Zealand and the Canon Law Society of Great Britain and Ireland reacted, pointing out the grave risk of civil actions for defamation of character, if the acts of the case are published. They urged that the judge should have the discretionary power to withhold all or part of the acts from the publication, while still making them available to their advocates.[24] In view of the critical comments on these norms, the consulters at their meeting on 11 December 1978 considered the following: 1) publishing the acts might render the relationship between the parties more difficult; 2) the witnesses could suffer serious harm if their testimony is published; 3) civil actions for slander and defamation might be introduced against parties or witnesses; and 4) the parties or witnesses might be subject to criminal prosecution.

The *coetus studiorum* regarded these concerns as having merit and decided to make some modifications in the canon to obviate the harm that could befall the parties or witnesses through illicit use of the acts before civil courts. Taking into consideration all these remarks, the Code Commission has tempered the obligation of the publication of all the acts bringing forth several changes in the 1980 *Schema*.

2.3 The 1980 *Schema*

The draft of can. 1550 of the 1980 schema prescribed:

> §1. After the proofs have been collected, the judge by a decree must, under the pain of nullity, permit the parties and their advocates to inspect at the tribunal chancery the acts which are not yet known

right and it needs to be balanced with the public good and the scandal of the people concerned; fourthly, this rigorous requirement for publication was not necessary in the cases for the declaration of nullity of marriage since the actual defendant in the process was the matrimonial bond and not parties.

[23] To know more about the reactions: cf. C.A. Cox, *Procedural Changes in Formal Marriage Nullity Cases from the 1917 to the 1983 Code. Analysis, Critique and Possible Alternatives*, Dissertation, (Washington: Catholic University of America, 1989), 80-83.

[24] Cf. Canon Law Society of Australia and New Zealand Newsletter, *Observations*, Spring 1977, Appendix IIa, p. 4; Canon Law Society of Great Britain and Ireland, *Report on the schema canonum de modo procedendi pro tutela iurium seu de processibus*, September 1977, 10.

> to them; a copy of the acts can also be given to the advocate upon request, unless in cases concerned with the public good, in order to avoid very serious dangers, the judge determines that an individual act is to be given to no one.
>
> §2. In order to complete the proofs, the parties may propose additional proofs to the judge; when these, if the judge deems it necessary, have been collected, there is again a place for the decree mentioned in §1.[25]

Obviously, can. 1550 of the 1980 *schema* made some reservations regarding the publication of the acts. It maintained the requirement of publication under pain of nullity, but also permitted the judge to decide not to hand over a particular act so as to avoid a serious danger.

Several episcopal conferences had similar difficulties with the text of can. 1550 of the 1980 *schema* as to that of 1976. The *relatio* was based on the reactions to the 1980 *schema* and it reported that many conferences of bishops were against granting access to the acts and the evidence due to the failure of civil litigation. They noted that the provision enshrined at the end of the first paragraph is inadequate. Two consultors advocated the removal of the clause "under the pain of nullity."[26] In the *relatio*, the secretariate responded that the canon as proposed adequately discussed the delicate situation by way of adding final clause of the first paragraph and emphasized the need of protecting the right of defence. The secretariate stated that the final clause of the first paragraph of the 1980 *schema* addresses and attempts to resolve the delicate consequences of publication, i.e., civil actions/suit for the defamation of character, by granting the permission to judge to withhold an individual act in cases which concern public good

[25] *Communicationes* 16 (1984): 68: "Can. 1550, §1. Acquisitis probationibus, iudex decreto partibus et earum advocatis permittere debet, sub poena nullitatis, ut acta nondum eis nota apud tribunalis Cancellariam inspiciant; quin etiam advocatis id petentibus dari potest actorum exemplar, nisi in causis ad bonum publicum spectantibus iudex ad gravissima pericula evitanda aliquod actum nemini tradendum esse censeat."

§2. Ad probationes complendas partes possunt alias probationes iudici proponere; quibus, (si iudex necessarium duxerit, acquisitis,) iterum est locus decreto de quo in §1.

[26] *Communicationes* 16 (1984): 68: "Duo patres petunt ut supprimatur clausula "sub poena nullitatis", quia numerosas gignit difficultates et ad traditionem canonicam non pertinent."

and therefore to avoid serious dangers or even to give the copy of the acts to the advocates.[27]

In the *plenaria* of 26 October 1981, it was discussed that the acts could be published to the defender of the bond instead of the parties.[28] Cardinal Castillo Lara articulated that the publication of the acts was intimately connected with the right of defence and therefore, the defence was not possible unless the party himself/herself knew the evidence, which must then be responded to.[29] Cardinal Pericles Felici also opined that if a document was given only to the defender of the bond, the party might be deprived of the possibility of developing an argument for his/her defence.[30] He went on to explain that the publication of the acts was the source of the defence and stated:

> For, this is a judicial publication, it is not a publication in a journal, in a periodical; a judicial publication, so that the parties, who are contending with each other, are able to see the things as they are and to defend themselves.[31]

Therefore, the judicial publication was executed in order that the parties might be able to defend themselves and consequently the sentence is able to be granted with equity. He continued to say that publication

[27] *Communicationes* 16 (1984): 68.

[28] *Communicationes* 16 (1984): 68; Pontificium Consilium De Legum Textibus, Congregatio plenaria, diebus 20-29 Octobris 1981 habita: Acta et documenta pontificiae commissionis codici iuris canonici recognoscendo, (Vatican City: Typis Polyglottis Vaticanis, 1991), 470-471: It was the intervention of Archbishop, later Cardinal, Joseph L. Bernardin: Id itaque quod constituitur in servando satis non sunt ad omnes difficultates praecavendas. Urgeo igitur haec verba adiungi Canoni 1643: "Publicatio actorum fiat ad normam Canonis 1550, 1, nisi Iudex ad gravissima evitanda pericula, censeat aliquod actum notum faciendum esse Defensori Vinculi dumtaxat."

[29] Cf. Pontificium Consilium De Legum Textibus, *Congregatio plenaria, diebus 20-29 Octobris 1981 habita: Acta et documenta pontificiae commissionis codici iuris canonici recognoscendo*, (Vatican City: Typis Polyglottis Vaticanis, 1991), 472: "Ut omnes scitis, causa pro qua publicatio actorum exigitur, est quia intime cum iure defensionis conectitur, quia non posset quis sese defendere, nisi sciat de quo agatur."

[30] Cf. *Ibid.*, 473: "Unde si aliquod documentum tradatur tantum defensori vincula, potest deficere advocatos vel etiam aliam partem, v. g., argumentum ad sese defendendum."

[31] *Ibid.*: "Nam, haec publicatio iudicialis est, non est publicatio in foliis, in periodicis; publicatio iudicialis, ita ut partes quae contendunt possint videre res uti sunt et sese defendere."

of the acts pertains to the right of defence and therefore anything, which might be useful for a defence, be made known.[32] In the discussion Cardinal Bafile suggested that just testimony be given to the advocates and to the parties with no names attached, i.e., by way of removal of names of the witnesses.[33] Archbishop Castillo Lara opined that the removal of the names of the witnesses would not solve the problem since in matrimonial cases it would not be too difficult to identify the author.[34] Cardinal Felici was of the opinion that sequestration of the names of the witnesses would contribute to the corruption of the right of defence.[35]

Then, Cardinal Hume summarized, stating the following:

> 1. Can. 1550, §1 does not adequately deal, in the last clause, with" the gravest consequences, especially in civil law, for personnel of the tribunal, for the parties and the witnesses and even for the bishop moderators; 2. The right of defence is not something absolute, but must be moderated in an efficacious manner by the needs of the public good and avoiding scandal to the Christian faithful; 3. Even if only the advocate, and not the parties, are permitted to petition for a copy of the acts, there is nothing in the law to prohibit the advocate from communicating it to the party or also of handing over to the party and individual act.[36]

Archbishop John Robert Roach, president of the Canon Law Society of America, sent a letter to Pope John Paul II on this matter. The continuing effort to influence the wording resulted in an important amendment. Consequently, the *schema* of the 1982 stated that the judge

[32] *Ibid.*, 473.

[33] *Ibid.*, 471.

[34] *Ibid.*, 472.

[35] *Ibid.*

[36] Pontificium Consilium De Legum Textibus, *Congregatio plenaria, diebus 20-29 Octobris 1981 habita: Acta et documenta pontificiae commissionis codici iuris canonici recognoscendo*, 479: "Canon uti iacet non "sufficienter provedit ultima clausola" contra gravissima consectaria praesertim iuris civilis, pro tribunalis ministris, pro partibus ac textibus (sic), immo et pro Episcopis moderatoribus; 2. Ius defensionis non est quid absolutum, sed moderari debet, et quidem modo efficaci, exigenstiis tutelae boni publici ac evitationis scandali christifidelium; 3. Etiamsi Adovocatis tantum, non autem partibus, liceat exempla actorum petere, nihil iuris prohibet quominus advocatus parti communicet vel etiam tradat aliquod actum."

was now not only able to withhold a copy of certain acts from individuals (cf. can. 1580 of the 1980 *schema*) but even the authority to decide not to show a given act to anyone, provided that the right of defence remained intact.

2.4 Can. 1598 of 1982 *Schema* and Can. 1598 of *CIC* 1983

Considering all the above-mentioned discussions and proposals, can. 1598 of the 1982 *schema* prescribed as following:

> §1. After the proofs have been collected, the judge by a decree must, under the pain of nullity, permit the parties and their advocates to inspect at the tribunal chancery the acts which are not yet known to them; a copy of the acts can also be given to advocates upon request; however, in cases concerned with the public good, in order to avoid very serious dangers, the judge can decree that a given act is not to be shown to anyone, with due concern, however, that the right of defence always remains intact.
>
> §2. In order to complete the proofs the parties may propose additional proofs to the judge; if the judge deems it necessary, when these have been collected there is an occasion for repeating the decree mentioned in §1.[37]

There were no further changes, both in number and content of the canon between the 1982 *schema* and the finally promulgated *CIC* 1983. The phrase, "right of defence" (*ius defensionis*) which was added in can. 1598 of the 1982 *schema* is important since, for the first time, the underlying value of this canon is explicitly stated in the law.[38]

3 THE OBJECTIVE OF THE PUBLICATION OF THE ACTS

Gullo observes:

> Once the instruction is over, the judge has the right to publish the acts (can. 1598) and it is evident that the knowledge is a necessary condition because the party can defend themselves, contradicting

[37] Pontificio Commissio Codici Iuris Canonici Recognoscendo, *Codex Iuris Canonici: Schema Novissimum*, (Civitate Vaticana: 1982), 277.

[38] Cf. C.A. Cox, *Procedural Changes in Formal Marriage Nullity Cases from the 1917 to the 1983 Code. Analysis, Critique and Possible Alternatives*, 83.

> the proofs produced by the opposing party and explaining his position with arguments.[39]

Two chief values motivate the requirement of the publication of the acts, these being: "1) to provide for the parties' right of defence; and 2) to test the evidence, thus assuring the tribunal that the truth has been discovered."[40]

According to the first purpose, the publication of the acts is necessary to enable the parties to exercise their right of defence. Can. 1598 §1 obliges the judge to permit the parties and their advocates to inspect the acts at the tribunal under pain of nullity. To that end, the publication of the acts gives sufficient time for the parties to know the acts, and thus offers them the possibility to defend themselves in the process. This stage of the process is, in fact, the place par excellence of the right of defence. Non-publication of the acts will lead to nullity of the sentence on the basis of the denial of the right of defence as stipulated in can. 1620, 7° (cf. *DC* art. 270, 7°). Therefore, the publication of the acts is key to ensuring the validity of the process and sentence.[41] Indeed, the canon tries to protect the right by imposing an irremediable nullity of a sentence, if this right is denied to any party. The Rotal decision upholds this, stating that the sentence is irremediably null due to the violation of the right of defence as the parties were not allowed to inspect the acts.[42]

[39] C. Gullo, "Il diritto di difesa nelle varie fasi del processo matrimoniale", in *Il diritto alla difesa nell'ordinamento canonico. Atti del XIX congresso canonistico Gallipoli – Settembre, 1987* (Studi Giuridici 18), (Vatican City: Libreria Editrice Vaticana, 1988), 40: "Una volta completata l'istruttoria, il giudice ha il dovere di pubblicare gli atti (can. 1598) ed è evidente che la loro conoscibilità è presupposto necessario perché la parte possa difendersi, contraddicendo le prove prodotte da parte avversa ed illustrando con argomentazioni la propria posizione."

[40] C.A. Cox, "Commentary on can. 1598", in J.P. Beal – J.A. Coriden – T.J. Green (eds), *New Commentary on the Code of Canon Law*, (Bangalore: Theological Publications in India, 2000), 1707.

[41] Cf. A. Mendonça, "Procedural Violations Amounting to Nullity of a Definitive Decision", in *Canonical Studies* 16 (2012): 107.

[42] Cf. *Coram* Anné, 13 February 1968, *RRDec.*, Vol. 60 (1968): 90, n. 2: "Perpensis cann. 11, 1680 necnon 1892 et 1894, omissio publicationis, saltem materialis, quorundam documentorum in actis contentorum, nullitatem sententiae tantum secumfert si eainde graviter laedetur ius defensionis";

Secondly, from the point of view of the court, the purpose of publishing the acts is to establish credibility of the evidence and thereby assuring that judge bases his judgement on a solid foundation. This is constantly enumerated on many occasions by the decisions of the Roman Rota and of the Supreme Tribunal of the Apostolic Signatura.[43] Upon reviewing the acts and challenging one or two minor points, the parties may indicate that the collected evidence reflects the truth.[44] This assures the judges that they have a solid foundation underpinning their decision.

4 THE JURIDICAL IMPLICATIONS OF CAN. 1598 §1

This study has so far examined the concept, origin, and evolution of the juridical provision for the publication of the acts starting from *CIC* 1983 and subsequently running through the various *schemae* (1976, 1980, 1982) which ultimately gave shape to can. 1598 of *CIC* 1983. The following section proceeds to examine the same canon which enshrines the provision for the publication of the acts, the intricacies related to it, and the prospects envisaged by the Rotal jurisprudence and other canonical documents.

4.1 The First Part of the Can. 1598 §1 – The General Rule

Can. 1598 §1 prescribes:

> When the evidence has been assembled, the judge must, under pain of nullity, by a decree permit the parties and their advocates to inspect at the tribunal office those acts which are not yet known to them. Indeed if the advocates so request, a copy of the acts can be given to them. In cases, which concern the public good, however,

Coram Arokiaraj, 28 May 2010, in *Studies in Church Law* 6 (2010): 389-396; A. Mendonça, "Violation of the Procedural Principles in Marriage Nullity Causes Originating from India", in *Canonical Studies* 16 (2012): 124-140.

[43] Cf. *Coram* Brennan, 27 November 1958, *RRDec.*, Vol. 50 (1958): 659-667, n. 3; *Coram* Lefebvre, 9 February 1974, *RRDec.*, Vol. 66 (1974): 64-70, n. 5; *Coram* Davino, 1 April 1976, *RRDec.*, Vol. 68 (1976): 161, n. 3; *Coram* Stankiewicz, 25 February 1982, in *Monitor Ecclesiasticus* 108 (1983): 306-312; STAS, *Coram* Sabattani, 17 January 1987, in *Periodica* 77 (1988): 338-341, nn. 13-14; *Coram* Giannecchini, 26 March 1987, *RRDecr.*, Vol. 5 (1987): 52-56.

[44] Cf. C.A. Cox, "Commentary on can. 1598", in J.P. Beal – J.A. Coriden – T.J. Green (eds), *New Commentary on the Code of Canon Law*, 1707.

> the judge can decide that, in order to avoid very serious dangers, a given act is not to be shown to anyone. He must take care, however, that the right of defence always remains intact.[45]

This provision has been incorporated in *DC* artt. 229-236. This publication and inspection of the acts of the case in process is one of the crucial areas regarding the right of defence. According to Pope John Paul II, publication of the acts is one of the principal moments through which the tribunal provides the possibility for the exercise of the right of defence.

The general rule is that, when proofs in a case have been assembled, under pain of nullity, the judge is obliged to issue a decree of publication, which permits the parties and their advocates to inspect them, i.e., to read through those acts which are not yet known to them (*nondum eis nota*).[46] However, their own depositions, any procedural decrees addressed to them, and any documentary proof supplied by them. do not have to be published.[47] It is not that the judge is merely obliged to issue the decree of the publication of the acts; the judge must also ensure that the acts are effectively known to the parties in the tribunal. Therefore, he cannot issue the decree of the publication of the acts and then prevent the parties from reading the acts personally in the tribunal office.[48] After the proofs have been gathered, the judge must publish the acts (*acta*) before proceeding to the discussion of the case (cf. can. 1598 §1; *DC* art. 229 §1). The term *actum* or *acta* in this context means the *acta iudicialia* (judicial acts) which include *acta causae*, i.e., the testimonies and other proofs, and *acta processus*

[45] Can. 1598 §1: "Acquisitis probationibus, iudex decreto partibus et earum advocatis permittere debet, sub poena nullitatis, ut acta nondum eis nota apud tribunalis cancellariam inspiciant; quin etiam advocatis id petentibus dari potest actorum exemplar; in causis vero ad bonum publicum spectantibus iudex ad gravissima pericula evitanda aliquod actum nemini manifestandum esse decernere potest, cauto tamen ut ius defensionis semper integrum maneat."

[46] Cf. C. Izzi, "Publicación de las actas procesales", 655-657.

[47] Cf. A. Mendonça, "What is New? A Brief Analysis of Selected Themes Found in *Dignitas connubii*", in *Studies in Church Law* 2 (2006): 233.

[48] Cf. M.J. Arroba Conde – C. Izzi, *Pastorale giudiziaria e prassi processuale nelle cause di nullità del matrimonio. Dopo la riforma operata con il Motu proprio Mitis Iudex Dominus Iesus*, (Milano: San Paulo, 2017), 117.

(processual acts), i.e., all acts which concern the process of the case, such as the acceptance of the petition and issuing of various decrees.[49] It is vital for the parties to have the ability to respond to every act that concerns their right. The idea is that the parties have the possibility of pursuing their interest in the case to the fullest.[50]

It is the judge who then issues the decree by which the parties and their advocates are given the faculty of examining the acts. In can. 1598 §1, the conjunctive *et*[51] (and) implies that both the parties and the advocates must be conjunctively allowed to inspect the acts. This inspection is to be conducted only at the tribunal office. But if a party resides in a place, which is very distant the tribunal where the case is pending, he/she can look at the acts in the tribunal of the place where he/she resides or in another suitable place so that his/her right of defence is protected.[52] Moreover, if the advocates so request, a copy of the acts can be given to them. Indeed, when the law insists on the publication of the acts, it tries to protect the right of defence of both parties.

4.2 The Place of Inspection

The publication of the acts should always occur within an ecclesiastical tribunal so that the acts of the case would not fall in the wrong hands.[53] As a rule, publication will be done in the tribunal before which the case is pending. The place of examination of the acts could play a crucial role in the exercise of the right of defence, especially for the respondent, if his/

[49] Cf. R. Rodríguez-Ocaña, "The Publication of the Acts, the Conclusion of the Case and the Discussion", in Á. Marzoa *et alii* (eds), *Exegetical Commentary on the Code of Canon Law*, Vol. 4/2, (Montréal: Wilson & Lafleur Limitée, 2004), 1401.

[50] Cf. E.J. Dillon, "Confidentiality of Testimony – An Implementation of Canon. 1598", in *The Jurist* 45 (1985): 289.

[51] Can. 1598 §1: "Acquisitis probationibus, iudex decreto partibus et earum advocatis permittere debet, […]."

[52] Cf. M.J. Arroba Conde – C. Izzi, *Pastorale giudiziaria e prassi processuale nelle cause di nullità del matrimonio. Dopo la riforma operata con il Motu proprio Mitis Iudex Dominus Iesus*, 118.

[53] Cf. K. Lüdicke – R.E. Jenkins, *Dignitas Connubii: Norms and Commentary*, (Alexandria: CLSA, 2006), 379.

her domicile is remote from the see of the tribunal processing the case.[54] According to can. 1598 §1, the canonical provision for the inspection of the acts at the "tribunal office" poses a hindrance to the exercise of the right of defence for the parties who live far away from the see of the tribunal. While reaffirming the same provision of can. 1598 §1, i.e., tribunal chancery, *DC* goes a step further, following the jurisprudential developments[55] and can. 1418, to overcome the aforementioned difficulties of the parties.

Can. 1418 provides the general principle applicable to this matter in any type of trial. It stipulates, "every tribunal has the right to call on other tribunals for assistance in instructing a case or in communicating acts." Now this principle, reaffirmed with further explanation, is explicitly incorporated into *DC* art. 233 §2, which decrees:

> "[...] if a party lives far away from the see of this tribunal, he can inspect the acts at the see of the tribunal in the place where he now lives, or else in another suitable place, in order that his/her right of defence remains intact."[56]

4.3 *Mitis Iudex Dominus Iesus (MIDI)*

Ratio procedendi art. 7 §2 of *MIDI* also makes a clear reference to the cooperation between the tribunals.[57] Therefore, in order to make the exercise of their right of defence feasible for the parties who live far from the tribunal, it can be permitted, subject to request, that the publication takes place at the see of another ecclesiastical tribunal closer to their place

[54] Cf. A. Mendonça, "What is New? A Brief Analysis of Selected Themes Found in *Dignitas connubii*", 237.

[55] Cf. Z. Grocholewski, "Different Grades and Kinds of Tribunals", in Á. Marzoa *et alii* (eds), *Exegetical Commentary on the Code of Canon Law*, Vol. 4/2, 715.

[56] *DC* art. 233 §2: "Si autem pars longe commoretur a sede huius tribunalis, acta inspicere potest in sede tribunalis loci ubi actu residet, vel in alio loco idoneo, ut eius ius defensionis integrum maneat."

[57] Cf. Francis, Motu Proprio *Mitis Iudex Dominus Iesus* (15 August 2015), in *AAS* 107 (2015): 958-970: *RP* art. 7 §2: "Through the cooperation between tribunals mentioned in can. 1418, care is to be taken that everyone, parties or witnesses, can participate in the process at a minimum of cost." (*MIDI* refers to *Mitis Iudex Dominus Iesus*).

of residence[58] or the tribunal to which he/she may have an easier access to the examination of the published acts. The publication of the acts is very crucial to a party's right of defence and the law offers the parties such a possibility through this norm.[59] If this right is denied, the sentence would be irremediably null. Therefore, to facilitate proper administration of justice, the law calls for mutual co-operation between tribunals.[60]

4.4 The Second Part of the Can. 1598 §1 - Exemption to the General Rule

The second part of the paragraph of can. 1598 §1[61] is the exemption to the aforementioned general rule of the publication. It points out, "in cases, which concern the public good, however, the judge can decide that, in order to avoid very serious dangers, a given act is not to be shown to anyone. He must take care, however, that the right of defence always remains intact." The purpose or reason for this norm of restriction is to provide the judge with a means whereby he is able to protect the various people who had participated in the judicial process from being sued in the civil courts on the basis of the information they had provided in the tribunal.[62] While arriving at such a decision the judge must, however, ensure that the right of defence always remains intact. Undeniably, the marriage cases concern public good. Though the provision of can. 1598 §1 obliges the publication of the acts, under pain of nullity, it provides an exemption for certain acts or a given act (*aliquod actum)* not being made

[58] Cf. K. Lüdicke – R.E. Jenkins, *Dignitas Connubii: Norms and Commentary*, 379-380.

[59] Cf. A. Mendonça, "Reflections on Some Important Themes Contained in *Dignitas connubii*", in *Canonical Studies* 19 (2005): 130.

[60] Cf. M.A. Plewka, "The Right of Defence in Certain Stages of the Matrimonial Process as Found in the Decisions of the Roman Rota", in *CLSA Proceedings of the Fifty-Third Annual Convention*, (Washington: CLSA, 1991), 255.

[61] Cf. Can. 1598: "In causis vero ad bonum publicum spectantibus iudex ad gravissima pericula evitanda aliquod actum nemini manifestandum esse decernere potest, cauto tamen ut ius defensionis semper integrum maneat."

[62] Cf. *Communicationes* 11 (1979): 134; E.J. Dillon, "Confidentiality of Testimony – An Implementation of Can. 1598", 289; J.G. Proctor, "Procedural Change in the 1983 Code: The Experience of the Ecclesiastical Provinces of California", in *The Jurist* 45 (1984): 468.

known to those who are involved in the process. Therefore, the right to inspect the acts is not absolute.[63]

4.4.1 Origin and the Motive for the Exemption

The origin of this norm for the restriction of the access to a given act of the case is based on norm 18 of American procedural norms.[64] This particular norm prescribed that the parties to the case were to be permitted to read the acts of the case "unless, in the opinion of the judge, there was a danger of violating the rights of privacy." This norm derogated from cann. 1858 and 1859 of *CIC* 1917, which did not place any restriction on the right of the parties to inspect all the acts of the case at the time of publication of the acts.[65] This restriction was to be sparingly used by the judge. It was recognized that occasionally the use of such a norm would serve the cause of truth by freeing a witness from fear of loss of friendship, embarrassment, or recrimination. Moreover, this norm would enable the tribunal to obtain sensitive information needed for an equitable decision from a witness who might otherwise be reluctant or unwilling to testify unless his/her confidentiality could be assured. Wrenn makes further reference to this context by observing that the revelation of all the acts would harm and endanger the reputation of others, trigger quarrels or

[63] Cf. E.J. Dillon, "Confidentiality of Testimony – An Implementation of Canon. 1598", 289.

[64] Cf. Consilium Pro Publicis Ecclesiae Negotiis, "De procedura in causis matrimonialibus concessa conferentiae episcoplai U.S.A", in *Periodica* 59 (1970): 563-592; This is translated by the National Conference of Catholic Bishops: *Procedural Norms for the Processing of Formal Marriage Cases*, USCC Publications Office, Washington 1970. It is for the text of the rescript *Attentis precibus* issued on 28 April 1970 by the council for the public affairs of the Church which granted particular norms for the adjudication of marriage cases to the Church in United States. Norm 18 observes, "(De actorum publicatione) - Cum, consultis patrono et vinculi defensore, iudex decreverit omnes probationes necessarias et possibiles fuisse collectas, partes poterunt per legere acta, nisi, secundum iudicis aestimationem, periculum adsit violandi iura secreti. Iudex rationem habebit postulationum ulterioris instructionis, quae praesentarentur a partibus, antequam decernet conclusionem in causa"; J. Llobell, *I processi matrimoniali nella chiesa*, (Roma: EDUSC, 2015), 182.

[65] Cf. Can. 1858 of *CIC* 1917: "Ante causae discussionem et sententiam omnes probationes quae sunt in actis et quae adhuc secretae permanserunt, sunt publicandae." Can. 1859 of *CIC* 1917: "Concessa partibus earumque advocatis facultate acta processualia inspiciendi petendique eorum exemplar, intelligitur facta publicatio processus."

cause scandal or any untoward consequences.[66] These too could be counted among those, which cause very serious dangers, thus favouring the non-publication of the acts. Besides, Rotal jurisprudence considers as motives for non-publication of the acts, those in which the witnesses refuse to appear before the court, if the depositions are not kept in confidence,[67] and there is a danger of being submitted to a criminal judgement.[68]

4.4.2 Interpretation of Term 'Danger' (*gravissima pericula*)

It is the discretion of the judge to assess the dangers present in a specific case and make an appropriate determination.[69] The delicate responsibility of the judge is to balance all the elements in the case. The discretion of the judge is a hinge on which this door swings.[70] For the judge to decide to not publish the acts, the assumption of danger is not enough.[71] This danger should be real and serious[72] and does not include ordinary danger or any sort of danger that is not very serious in a concrete way.[73] Hence, the inconvenience, embarrassment and the preference or request of a party or a witness not to have their testimony made known are insufficient motives to exempt an act from publication.[74] The exemption provided in

[66] Cf. L.G. Wrenn, *Procedures*, CLSA, Washington 1987, 61; D.S. Fernandes, "Procedures to be Followed in Marriage Nullity Cases", in *Canonical Studies* 25 (2011): 112.

[67] Cf. *Coram* Pinto, 24 May 1985, in *Monitor Ecclesiasticus* 113 (1988): 314-319.

[68] Cf. *Ibid.*

[69] Cf. A.R. Remo, "The Right of Defence and the Defence of Rights", in *Philippine Canonical Forum* 2 (2000): 210.

[70] Cf. D.A. Smilanic, "The Publication of the Acts: Canon 1598 §1", in *CLSA Proceedings of the Fifty-Seventh Annual Convention*, (Washington: CLSA, 1995), 386.

[71] Cf. R. Rodríguez-Ocaña, "The Publication of the Acts, the Conclusion of the Case and the Discussion", in Á. Marzoa *et alii* (eds), *Exegetical Commentary on the Code of Canon Law*, Vol. 4/2, 1404.

[72] Cf. Coram Giannecchini, 19 July 1991, *RRDecr.*, Vol. 9 (1991), 105, n. 3: "Tantum ad pericula gravissima vitanda non abstracte sed concrete et consideratis peculiaribus adiunctis […]"; A. Mendonça, "The Right of the Parties to Inspect the Acts and Its Relation to the Validity of a Definitive Sentence in a Marriage Nullity Process", in *Studia Canonica* 33 (1999): 313.

[73] Cf. F. Daneels, "Some Remarks Concerning the Concept of Fair Trial According to Canon Law", in *Forum* 6 (1995): 76.

[74] Cf. C.A. Cox, "Commentary on can. 1598", in J.P. Beal – J.A. Coriden – T.J. Green (eds),

can. 1598 §1 is to be strictly interpreted (cf. can. 18) as it limits the right of the parties to inspect the acts.[75] Therefore, if the judge, for insufficient motives, restricts the publication, the right of defence of the parties would be violated.

4.4.3 Only 'a Given Act' (*aliquod actum*)

Rotal judge Burke observes in one of his decisions:

> When the judge says that the petition of the parties to inspect the acts under the can. 1598 is subject to denial in whole or in part, he is exceeding his powers under the canon which allows for reservation of some (individual) document; not of the acts as a whole.[76]

Only a given act and not the acts as a whole may be exempted from publication. This might involve all the testimonies of one person or just a part of someone's testimony. Therefore, if the parties and their advocates are denied access to all or several acts under the pretext of this exemption, according to the teaching of the supreme legislator, it would be contrary to the letter and spirit of the law.[77] Can. 1598 §1 does not permit a judge to exempt all the acts from publication.[78] The Rotal jurisprudence reiterates on the expression "a given act" (*aliquod actum*) in the can. 1598, which opposes keeping under secrecy all the acts or most of them.[79] Napolitano states:

New Commentary on the Code of Canon Law, 1709.

[75] Cf. S. Di Grazia, "Problemi sull'assistenza tecnica nel processo matrimoniale", in *Il diritto alla difesa nell'ordinamento canonico. Atti del XIX congresso canonistico Gallipoli – Settembre*, 1987 (Studi Giuridici 18), (Vatican City: Libreria Editrice Vaticana, 1988), 57; V. De Paolis – A. D'Auria, *Le norme generali. Commento al codice di diritto canonico*, (Vatican City: Urbaniana University Press, 20142), 167.

[76] *Coram* Burke, 15 November 1990, *RRDecr.*, Vol. 8 (1990): 175, n. 20: "Qunado Iudex statuit quod quaevis partium petitio ad acta ad normam can. 1598 inspicienda, "is subject to denial in whole or in part", ultra vires agit iuxta eundem canonem qui, sicut in parte 'In iure' vidimus, permittit ut aliquod (singulare) actum reservari queat, minime vero integra acta."

[77] Cf. A. Mendonça, "The Right of the Parties to Inspect the Acts and Its Relation to the Validity of a Definitive Sentence in a Marriage Nullity Process", 313.

[78] Cf. C.A. Cox, "Commentary on can. 1598", in J.P. Beal – J.A. Coriden – T.J. Green (eds), *New Commentary on the Code of Canon Law*, 1709.

[79] Cf. *Coram* Stankiewicz, 26 October 1990, *RRDecr.*, Vol. 8 (1990): 161, nn. 13-14.

> The judge, as is known, can exceptionally decide that some act is not published without compromising the right to defence. It is not allowed to keep under secrecy all the acts; but only a quantitatively marginal part of the investigation when it is really serious and concretely risky and not merely those acts which are supposed to be serious.[80]

According to Rotal Judge Funghini, a restriction regarding the publication of the acts can be justified under three conditions: 1) the limitation may affect only a given act or acts, not all of them; 2) the aim of the limitation must be to avoid a serious specific danger; and 3) the limitation must not deny the right of defence of a party.[81]

4.4.4 The Right of Defence Remains Intact (*ius defensionis integrum maneat*)

Can. 1598 §1 prescribes that even though the judge can decide to restrict access to a given act in order to avoid serious dangers, he must take care that the right of defence always remains intact. This norm considers the fact that though the right of defence is based on natural law, the exercise of this particular right is realized through various means envisaged by positive law. Therefore, this norm establishes a co-relationship between the restriction of access to a given act and the necessity to have access to that given act in order that one may adequately exercise one's right of defence. Therefore, while the judge can restrict access to a given act in a case, he must also ensure that the right of defence is not violated.

[80] E. Napolitano, "Il processo ordinario dopo la riforma", in Gruppo Italiano Docenti Di Diritto Canonico (ed.), *La riforma del processo canonico per la dichiarazione di nullità del matrimonio* (Quaderni della Mendola 26), (Milano: Glossa, 2018), 264: "Il giudice, come è noto, può eccezionalmente decidere che qualche atto non venga pubblicato senza però compromettere il diritto alla difesa. Non è permesso segretare tutti gli atti ma solo una parte marginale dell'attività istruttoria e in presenza di un gravissimo rischio, reale e concreto, non semplicemente supposto"; cf. M.J. Arroba Conde – C. Izzi, *Pastorale giudiziaria e prassi processuale nelle cause di nullità del matrimonio. Dopo la riforma operata con il Motu proprio Mitis Iudex Dominus Iesus*, 118.

[81] Cf. *Coram* Funghini, 11 May 1994, *RRDecr.*, Vol. 12 (1994): 91, n. 2: "Exceptio autem bene circumscribitur: non actorum [...], sed singulum quoddam actum et provisio non absoluto arbitrio iudicis relinquitur cum idem hac facultate uti possit 'ad gravissima pericula vitanda' et invulnerato manente iure defensionis."

Carlo Gullo is of the opinion that the right of defence, enshrined in the natural law, illustrates two concerns, which led to the evolution of can. 1598. The first reason is the unchecked discretionary power of the judge in instructing the case and the resulting lack of full care for the fundamental right of defence of the parties. He opines that the extension of the discretionary capacity of the judge may endanger subjective rights. Secondly, even though the right of defence was assumed to be a fundamental norm in Canon Law, the protection of this right was never fully articulated.[82] Therefore, can. 1598 enumerates these two concerns. On the one hand, the judge has the discretionary power to withhold an individual act from publication. On the other hand, the sentence will be null if the right of defence is breached.

5 THE WALK ON A THIN LINE BETWEEN PUBLICATION AND CONFIDENTIALITY/SECRECY

The problem is how a given act can be withheld from publication while keeping the right of defence intact. The publication of the acts has always been viewed by the law as an extremely sensitive stage of the proceedings, precisely because of the tension between secrecy and publicity,[83] i.e., the final balance between the right of the parties to know what others have said in order to defend their stand and the right of the others to have their remarks protected by confidentiality.[84] On the one hand is the right of defence which is dictated by the exigencies of justice. On the other hand, the necessity of secrecy in the face of grave danger. Therefore, the requirement of allowing inspection of the acts may also

[82] Cf. C. Gullo, "Il diritto di difesa nelle varie fasi del processo matrimoniale", 30: "Da una parte estensione dei poteri discrezionali del giudice, diventato il vero arbitro del processo e, dove esiste discrezionalità, non esistono diritti soggettivi, tanto meno sanzionati con una nullità insanabile; dall'altra parte mai nella storia del diritto canonico il diritto di difesa delle parti era assunto a norma fondamentale dell'ordinamento, ne era mai stato tutelato con tanta ampiezza."

[83] Cf. A.R. Remo, "The Problems Surrounding the Publication of the Sentence, Their Causes and the Adopted Solutions", in *Philippine Canonical Forum* 6 (2004): 78.

[84] Cf. L.G. Wrenn, *Procedures*, 59.

raise questions about the willingness of others to give testimonies and the maintenance of confidentiality.[85] The tension between the publication of the acts and confidentiality is to be balanced by the discretion of the judge in a given case,[86] while keeping intact the right of defence. The marriage nullity procedure must respect both rights as far as possible.[87] To that end, the norms regarding publication require a delicate balance of values and interests. McGuckin states that can. 1598 tries to establish a delicate balance among the following: 1) requirement of publication under the penalty of nullity; 2) exclusion of access to some part of the acts by the judge to avoid serious dangers; and 3) the guarantee of the right of defence.[88] This is not an easy task to achieve since these three criteria appear to contradict one another.

6 THE MIDWAY POINT BETWEEN PUBLICATION AND CONFIDENTIALITY/SECRECY

The canonical literature has always attempted to sort out the problematic fine balance between confidentiality and publicity that revolves around can. 1598, and has significantly contributed to solve the issue. An analysis of some of the literature will certainly shed light on some possible prospects.

6.1 The Publication to the Advocates

Can. 1598 permits the exemption to the publication of the acts, that "must be shown to no one" (*nemini manifestandum esse*). However, *DC* has introduced changes inspired by the development of the Rotal

[85] Cf. K.J. Ruzick, "Competence, Nullity of the Acts and the Appeal Process: A Look at the Procedural Law of the Code", in *CLSA Proceedings of the Forty-Fourth Annual Convention*, (Washington: CLSA, 1982), 105-120.

[86] S. Di Grazia, "Assistenza tecnica nel processo matrimoniale", in *Monitor Ecclesiasticus* 113 (1988): 57.

[87] Cf. M.R. Moodie, "Fundamental Rights and Access to the Acts of a Case", in *Studia Canonica* 28 (1994): 138.

[88] Cf. R.M. McGuckin, "The Respondent's Rights in Matrimonial Nullity Case", in *Studia Canonica* 18 (1984): 469.

jurisprudence in order to strike a balance between the necessity for the confidentiality and the right to know and defend oneself. *DC* art. 230 makes a new and significant change with regard to the aforementioned exemption. *DC* art. 230 states, "in order to avoid very serious dangers, the judge can decree that some act is not to be shown to the parties, with due care taken however that the right of defence remains intact."[89] However, can. 1598 §1 states, "in cases pertaining to the public good to avoid a grave danger, the judge can decree that a specific act must be shown to no one; the judge is to take care, however, that the right of defence always remains intact."[90] There is a notable difference between these two texts. The canon says that a specific act "must be shown to no one" (*nemini manifestandum esse*) whereas *DC* states that it is "not to be shown to the parties" (*partibus manifestandum non esse*). This change in *DC* while complementing the canon provides better forum for the protection of the right of defence. *DC* stipulates that the acts can be held back only from the parties, not from the advocates. Llobell observes that this change is significant for the right of defence.[91] Therefore, *DC* art. 230 attempts to bridge the gap between the serious danger in the publication of the acts and the denial of the right of defence since it allows the judge to admit the advocate under certain conditions to study the specific act(s) withdrawn from the parties.[92] P. Moneta states:

> Secrecy is only for the parties, but not to the advocates who are therefore attributed with tasks and prerogatives and go far beyond those rights provided for the parties to whose defence they are deputies. This innovation seems today obvious and necessary, at least if we want to guarantee the right of defence of the parties in line with 'fair trial' that has now established itself in national and international judicial systems.[93]

[89] *DC* art. 230: "Ad gravissima autem pericula evitanda, iudex decernere potest aliquod actum partibus manifestandum non esse, cauto tamen ut ius defensionis semper integrum maneat."

[90] Can. 1598 §1: "In causis vero ad bonum publicum spectantibus iudex ad gravissima pericula evitanda aliquod actum nemini manifestandum esse decernere potest, cauto tamen ut ius defensionis semper integrum maneat." (This is the second part of the first paragraph).

[91] Cf. J. Llobell, *I processi matrimoniali nella chiesa*, 218; A. Menezes, "Reflections on Some Important Themes Contained in *Dignitas connubii*", 127.

[92] J.P. Beal, "Publish or Perish: Transparency and the Marriage Nullity Process", 70.

Therefore, the partial exclusion of acts from the publication is mitigated by the provision that the advocates can still view the non-published or withheld acts. This approach is to safeguard the right of defence that is best supported by most of the doctrine.[94] Communicating the acts to the advocate, if the parties have one, on the condition that the advocate does not communicate the contents of the act to the parties would seem to protect the right of defence better than not allowing anyone to see the act.[95] Moreover, advocates have the right to inspect the judicial acts, even those not yet published and to review the documents presented by the parties according to can. 1677 §1 (*MIDI*). I. Gordon opines that if the case is of a very serious nature, the judge may determine that an act which is able to create a difficulty would not even be shown to the advocate.[96]

6.2 The Administration of Oath to the Advocate

DC art. 234 decrees:

> If the judge thinks that in order to avoid very serious dangers some

[93] P. Moneta, "Il ruolo dell'avvocato nel nuovo ordinamento processuale", in *La riforma del processo matrimoniale ad un anno del Motu Proprio Mitis Iudex Dominus Iesus* (Annales 3), (Vatican City: Libreria Editrice Vaticana, 2017), 153: "Il segreto é rimasto nei confronti delle parti, ma non dei patroni che si vedono quindi attribuiti compiti e prerogatvie e che vanno ben al di là di quelle previste per le parti alla cui difesa essi sono deputati. Questa innovazione sembra oggi scontata e necessaria, per lo meno se si intende garantire il diritto di difesa delle parti in linea con quel modello di "giusto processo" che si é ormai affermato negli ordinamenti giudiziari nazionali ed internazionali."

[94] Cf. F. Daneels, "De iure defensionis. Brevis commentarius ad allocutionem summi Pontificis diei 26 Ianuarii 1989 ad Rotam Romanam", in *Periodica* 79 (1990): 257; (English version found in *Studia Canonica* 27 (1993): 77-95; *CLSGBI Newsletter* 93 (1993): 46-49); G. Erlebach, "Le fattispecie di negazione del diritto di difesa causanti la nullità della sentenza secondo la giurisprudenza rotale", in *Monitor Ecclesiasticus* 115 (1990): 387-433; C. Gullo, "La pubblicazione degli atti e la discussione della causa (cann. 1598-1606; can. 1682 §2)", in P.A. Bonnet – C. Gullo (eds), *Il processo matrimoniale canonico. Nuova edizione aggiornata e ampliata* (Studi Giuridici 29), (Vatican City: Libreria Editrice Vaticana, 1994), 685; E. Napolitano, "Il processo ordinario dopo la riforma", 264.

[95] Cf. D.A. Smilanic, "The Publication of the Acts: Canon 1598 §1", 383.

[96] I. Gordon, *Novus processus nullitatis matrimonii*, (Romae: Pontificia Università Gregoriana, 1983), 34

> act is not to be shown to the parties, the advocates of the parties, having first taken an oath or made a promise to observe secrecy, may study the same act.[97]

This principle is central to the right of defence of the parties, especially of the respondent.[98] The oath or promise administered to the advocate prior to showing the specific acts assures the judge of the advocate's objective approach to a sensitive situation that might emerge in the process for declaration of nullity of marriage. Therefore, the judge who uses his discretion to withhold a particular act from a party, bridges the gap between the publication of the acts and confidentiality. Although an advocate must represent his/her client's best interest, a canonical advocate should also have the public good of the Church at heart. To that end, P. Moneta states that according to the prescription of *DC* art. 235 §2, an advocate is not to share the knowledge he/she obtains from the inspection of the non-published act.[99]

6.3 The Administration of Oath to the Parties

Can. 1455 §3 (cf. *DC* art. 73 §3) offers the possibility of binding the parties to secrecy if their knowledge of matters internal to it threatens to harm someone. *DC* art. 232 §1 applies this norm to the inspection of the acts by decreeing:

> Before the examination of the acts, the judge can require the parties to take an oath or, as the case may be, a promise that they will use the knowledge gained through this inspection of the acts only for their legitimate defence in the canonical forum.[100]

[97] *DC* art. 234: "Si iudex censeat ad gravissima pericula evitanda aliquod actum partibus manifestandum non esse, idem actum, praevio iureiurando vel promissione de secreto servando, cognoscere possunt partium advocati."

[98] Cf. A. Mendonça, "Reflections on Some Important Themes Contained in *Dignitas connubii*", 128.

[99] Cf. P. Moneta, "Il ruolo dell'avvocato nel nuovo ordinamento processuale", 153: "Sulla stessa linea si pone anche la disposizione, che non trova riscontro nel codice, che fa obbligo agli avvocati di non consegnare copia degli atti ad altri, neppure alle stesse parti (art. 235 §2)."

[100] *DC* art. 232 §1: "Iudex ante inspectionem actorum a partibus memorandum vel, si casus ferat, promissionem exigere potest ut scientiam per huiusmodi inspectionem acquisitam tantum

Therefore, before the examination of the acts, the judge can ask the party to take an oath or promise to use what is known only for the legitimate exercise of the right of defence in the canonical forum. This is essential in order to prevent possible risks, deriving from the distorted use of the results of the acts.[101] The parties can be required to promise that any knowledge gained from viewing the acts will be used only for the purposes of the marriage nullity trial, i.e., within the context of their own right of defence before the ecclesiastical tribunal. A procedure of this kind would, in an appropriate case, clearly allow the judge to fulfill his obligation to ensure that the right of defence always remains intact. This opinion is supported by many authors.[102] Moreover, when there is an authentic concern that the information contained in the acts might be misused, judges, instead of not disclosing the acts to the parties, may protect the exercise of the right of defence by enforcing secrecy. The judge may enforce the parties' secrecy by demanding them or their procurators to sign a sworn and written declaration *ad rem* that they would use the information only in the canonical trial and maintain secrecy before granting them permission to view the acts.[103] Crucially, there is no need to reveal the addresses and telephone numbers of the parties and witnesses which have no bearing on the right of defence.[104] This method of finding a midway point between the exception to the publication and confidentiality protects the provision of the right of defence of the parties.

adhibeant ad legitimam defensionem in foro canonico exercendam."

[101] Cf. Can. 1455 §3 and *DC* art. 232 §1; M.J. Arroba Conde – C. Izzi, *Pastorale giudiziaria e prassi processuale nelle cause di nullità del matrimonio. Dopo la riforma operata con il Motu proprio Mitis Iudex Dominus Iesus*, 118.

[102] Cf. J.G. Johnson, "Publish and Be Damned: The Dilemma of Implementing the Canons on Publishing the Acts and the Sentence", in *The Jurist* 49 (1989): 210-240; D. Nau, "Publish and Be Damned: One Practioner's Experience", in *The Jurist* 51 (1991): 442-450; A. Farret, "Publication des actes et publication de la sentence dans les causes de nullité de marriage", in *Studia Canonica* 25 (1991): 115-138; M.P. Hilbert, "De publicatione actorum", in *Periodica* 81 (1992): 521-533.

[103] Cf. F. Daneels, "The Right of Defence", in *Studia Canonica* 27 (1993): 94.

[104] Cf. C.A. Cox, "Commentary on can. 1598", in J.P. Beal – J.A. Coriden – T.J. Green (eds), *New Commentary on the Code of Canon Law*, 1711.

6.4 The Publication of the Acts to the Defender of the Bond

An alternative point of view is presented by Wrenn.[105] He argues that the right of defence is guaranteed by publishing the acts to the defender of the bond. To support this view he cites the decision of the Rotal judge, Brennan in 1958.[106] Wrenn observes that from the time of Benedict XIV and more specifically from the promulgation in 1741 of his Apostolic Constitution *Dei miseratione*,[107] in which the *defensor matrimonii* was mandatory in every diocese, it was assumed that in marriage cases, the right of defence belongs primarily not to the respondent but to the defender of the bond. According to him, under certain conditions some acts may be withheld from the parties but must, nevertheless, be shown to the defender of the bond. He considers that the scope of this canon does not seem to include the defender of the bond when it says that the judge may decide that a certain act be not shown to "anyone" (*nemini*). Therefore, in this way, the right of defence remains intact.[108] Indeed, Wrenn thinks that the right of defence is protected by the defender of the bond when he reviews the acts during its publication.[109]

On the other hand, there are other authors such as Daneels, Moodie and Smilanic who argue that the review of the defender of the bond

[105] Cf. L.G. Wrenn, *Procedures*, 60-62.

[106] Cf. *Coram* Brennan, 27 November 1958, 659-667: Brennan does hold the view that the right of defence is sufficiently respected when the acts of case are published to the defender of the bond. However, if this were the case, then the Rotal jurisprudence would be in error, for the Roman Rota on several occasions has declared the irremediable nullity of a sentence due to the denial of the right to inspect the act by a respondent, who is opposed even though the defender of the bond has intervened in the case and inspected the acts; F. Daneels, "Some Remarks Concerning the Concept of Fair Trial According to Canon Law", 67.

[107] Cf. Benedict XIV, Apostolic Constitution *Dei miseratione* (3 November 1741), in P. Gasparri (ed.), *CICFontes*, Vol. 1, (Romae: Typis Polyglottis Vaticanis, 1924-1951), n. 318, 695-701. The institution of Defender of the Bond was established by Benedict XIV through the Apostolic constitution *Dei miseratione*.

[108] Cf. L.G. Wrenn, *Procedures*, 61-62; S. Gherro, "Diritto alla difesa nei processi matrimoniali canonici", in *Monitor Ecclesiasticus* 113 (1988): 13.

[109] J.P. Beal, "Publish or Perish: Transparency and the Marriage Nullity Process", 67.

cannot replace the right of defence of the parties, which is their natural and fundamental right.[110] This is well attested to by Rotal decision, which has declared particular sentences as irremediably null due to the fact that while the defender of the bond exercised his office, one or both parties were denied the right of defence. They argue that the defender of the bond exercises his office for the sake of the public good. He is not given the mandate to do so by one of the parties, who enjoy their own proper right of defence, which cannot be denied. They argue that the citation in the Rotal decision of Brennan refers to a situation in which the other party does not get involved in the case. They continue to say that an earlier Rotal decision of Wynen observes it very well when it says that the defender of the bond does not represent one of the parties, such as the respondent. Indeed, the defender of the bond is one drawn from tribunal personnel for situations, which concern the bond of marriage. He can in no way act in the name of the respondent who might be either for or against the bond of the marriage.[111]

The Supreme Tribunal of the Apostolic Signatura also clarified this issue. It said that the trial deals with the situation of two individuals and not the situation of the defender of the bond. The individuals could have information pertaining to a marriage nullity trial, of which the defender of the bond may have no idea. In such a case, it is impossible to protect the right of defence of the parties if only the defender of the bond could review the acts. That is why the Rota has declared many sentences of first

[110] Cf. F. Daneels, "De iure defensionis. Brevis commentarius ad allocutionem Summi Pontificis diei 26 Ianuarii 1989 ad Rotam Romanam", 257-258; M.R. Moodie, "Fundamental Rights and Access to the Acts of a Case", 133; D.A. Smilanic, "The Publication of the Acts: Canon 1598 §1", 377-386.

[111] Cf. *Coram* Wynen, 30 January 1936, *RRDec.*, Vol. 28 (1936): 80, n. 12: "Defensor enim vinculi non repraesentat unam ex partibus, idest partem conventam, sed est magistratus seu una ex personis tribunal constituentibus, quoties agitur de vinculo matrimonii, scilicet in causis nullitatis matrimonii vel dispensationis super rato. Not potest agere nomine partis conventae quippe quae et ipsa saepe impugnat vinculum matrimonii, vel decursu iudicii in diversis instantiis mentem suam mutat."

instances as invalid for a defect of the right of defence in spite of the fact that the defender of the bond has had access to the acts of the case.[112]

6.5 Possible Prospects Envisaged by *Dignitas Connubii* (*DC*)

According to the innovations made by the *DC* based on the Rotal jurisprudential principles, the acts could be held back from the parties, but not from the advocates. This protects the right of defence of the parties. *DC* art. 230 prescribes, "in order to avoid serious dangers, the judge can decree that some act is not to be shown to the parties, with due care taken however that the right of defence remains intact."[113] On the contrary, can. 1598 §1 reads "in cases pertaining to the public good, to avoid a grave danger, the judge can decree that a specific act must be shown to no one; the judge is to take care, however, that the right of defence always remains intact."[114] The canon reads that some acts are to be shown to "no one" (*aliquod actum nemini manifestandum esse*) whereas the *DC* reads that some acts are not to be shown "to the parties" (*aliquod actum partibus manifestandum non esse*).

As we analyzed in the *schema* of the can. 1598, advocates can be given the acts in order to protect the right of defence. One of the ways in which the right of defence can be balanced with the capacity to withhold some

[112] Cf. STAS, Letter, prot. 24053/93 V.T. (22 June 1993), n. 4, as cited in D.A. Smilanic, *The Publication of the Acts: Canon 1598 §1*, (Romae: Pontificia Universitas Gregoriana, 2001), 59: "In causis nullitatis matrimonii utique agitur de existentia vinculi matrimonialis, vel minus, atvero non de vinculo in abstracto sed in concreto, quatenus scilicet afficit personas concretas quae in iudicium vocantur. Agitur, aliis verbis, de earum statu personali, non autem de statu defensoris vinculi. Ipsae partes in causa, insuper, saepe saepius propriam habent scientiam de facts concretis, quam defensor vinculi non habet. Proinde admitti nequit assertio iuxta quam ius defensionis partis conventae – quae sese declarationi nullitatis opponit – integrum maneret, si defensor vinculi acta inspicere valet. Ceterum, Rota Romana pluries nullitatem insanabilem sententiae declaravit ob ius defensionis parti conventae resistenti denegatum, quamvis defensor vinculi in causa intervenisset"; *Coram* Burke, 11 June 1992, *RRDecr.*, Vol. 10 (1992): 111-118.

[113] *DC* art. 230: "Ad gravissima autem pericula evitanda, iudex decernere potest aliquod actum partibus manifestandum non esse, cauto tamen ut ius defensionis semper integrum maneat (cf. can. 1598 §1)."

[114] Can. 1598 §1: "In causis vero ad bonum publicum spectantibus iudex ad gravissima pericula evitanda aliquod actum nemini manifestandum esse decernere potest, cauto tamen ut ius defensionis semper integrum maneat."

acts from publication is to make use of the advocate. The use of an advocate in delicate situations demands that the one appointed actually functions as an advocate and must take care to argue for the position of the client, to ensure that the client knows the problems, arguments and the proofs in view of gaining knowledge of his/her party in order to frame the arguments to oppose the standpoint of the other party. When the appointed advocates inspect the acts, there is no violation of the right of defence. In fact, the letter of the Supreme Tribunal of the Apostolic Signatura categorically indicates that if an act is withheld from publication and the sentence depends upon it, the services of a professionally-functioning advocate should be employed in order to safeguard the right of defence.[115] This is a development based on the Rotal jurisprudence *coram* Giannecchini[116] and Corso.[117]

7 THE UNTOWARD CONSEQUENCES OF NON-PUBLICATION OF ACTS

Violation of the obligation to publish the acts in accordance with can. 1598 §1 (cf. *DC* art. 229 §3) is sanctioned by *DC* art. 231 in two ways:[118] 1) in trials that concern the common good which includes all marriage nullity trials, it is always a matter of remediable nullity, if the sentence is based on acts that are themselves null (cf. can. 1622, 5°; *DC* artt. 231, 272, 5°). Therefore, if the obligation to publish is not adhered to, then according to *DC* art. 272, 5° the definitive sentence suffers from remediable nullity and if not challenged within three months, is sanated; 2) *DC* art. 231, however, adds that a case, in which the right of defence is actually denied, suffers from irremediable nullity according to can. 1620, 7° (cf.

[115] Cf. STAS, Letter, prot. 24053/93 V.T. (22 June 1993): n. 6.

[116] Cf. *Coram* Giannecchini, 23 May 1989, *RRDecr.*, Vol. 7 (1989): 95, n. 2. He observes that the parties and their legal representatives have the right to know all the proofs adduced by the other party, not excluding those which according to the norm of law have to be kept secret.

[117] Cf. *Coram* Corso, 28 February 1990, *RRDecr.*, Vol. 8 (1990): 49, n. 7. He argues that publication of the acts has to be done to the curator, when the curator has been appointed to a party.

[118] *DC* art. 231: "Violatio praescripti, de quo in art. 229 §3, nullitatem sanabilem sententiae secumfert, in casu vero iuris defensionis reapse denegati nullitatem insanabilem."

DC art. 270, 7°). These principles reflect the jurisprudential developments on can. 1598 §1. Gullo observes that a complete non-publication or the denial of requested access to the proofs which have been gathered triggers the nullity.[119] That is to say that such a denial deprives one of the capacity to contradict, explain or draw a different conclusion with regard to the proofs. Indeed, a steady flow of Rotal decrees since 1983 attests that an unjustifiably broad approach to excluding evidence from the parties at the time of the publication of the acts will result in sentences being declared irremediably null.[120]

Moreover, some canonists,[121] such as Rosario Castillo Lara, Manuel J. Arroba Conde and Ernest B.O. Okonkwo, based on several Rotal

[119] Cf. C. Gullo, "Il diritto di difesa nelle varie fasi del processo matrimoniale", 43: "Violazione del diritto di difesa si avrà dunque soltanto se dal Tribunale siano stati omessi tutti e tre quegli adempimenti oppure, se alla parte e al patrono che espressamente lo richiedano, sia stato negato il diritto di esaminare gli atti, almeno presso la sede del tribunale."

[120] *Coram* Doran, 18 May 1989, *RRDecr.*, Vol. 7 (1989): 91-92; ID., 19 May 1988, *RRDecr.*, Vol. 6 (1988): 129; *Coram* Boccafola, 25 July 1989, *RRDecr.*, Vol. 7 (1989): 144-149; *Coram* Burke, 13 December 1989, *RRDecr.*, Vol. 7 (1989): 204-206; *Coram* Doran, 3 May 1990, *RRDecr.*, Vol. 8 (1990): 95-96; *Coram* Colagiovanni, 18 May 1990, *RRDecr.*, Vol. 8 (1990): 98-99; *Coram* Stankiewicz, 26 October 1990, *RRDecr.*, Vol. 8 (1990): 160-163; *Coram* Burke, 15 November 1990, *RRDecr.*, Vol. 8 (1990): 175-176; *Coram* Colagiovanni, 11 December 1990, *RRDecr.*, Vol. 8 (1990): 199; *Coram* Boccafola, 16 April 1991, *RRDecr.*, Vol. 9 (1991): 52; ID., 25 July 1989, *RRDecr.*, Vol. 7 (1989): 144-149; *Coram* Serrano, 11 November 1991, *RRDecr.*, Vol. 9 (1991): 139-140; *Coram* Doran, 2 April 1992, *RRDecr.*, Vol. 10 (1992): 60-61; *Coram* Burke, 30 April 1992, *RRDecr.*, Vol. 10 (1992): 81-82; *Coram* Ragni, 23 June 1992, *RRDecr.*, Vol. 10 (1992): 148-150; *Coram* Doran, 26 November 1992, *RRDecr.*, Vol. 10 (1992): 203-205; *Coram* Stankiewicz, 27 May 1994, *RRDecr.*, Vol. 12 (1994): 125-126; *Coram* Boccafola, 5 December 1996, *RRDecr.*, Vol. 14 (1996): 244-245; *Coram* Burke, 22 May 1997, *RRDecr.*, Vol. 15 (1997): 92; ID., 7 May 1998, *RRDecr.*, Vol. 16 (1998): 126-127; *Coram* Turnaturi, 14 May 1998, *RRDecr.*, Vol. 16 (1998): 152-153; *Coram* Burke, 28 May 1998, *RRDecr.*, Vol. 16 (1998): 177; *Coram* Boccafola, 14 July 1998, *RRDecr.*, Vol. 16 (1998): 267; *Coram* Alwan, 15 February 2000, *RRDecr.*, Vol. 18 (2000): 36-37; *Coram* Erlebach, 26 October 2001, *RRDecr.*, Vol. 19 (2001): 126-127; *Coram* Vergenelli, 6 December 2001, *RRDecr.*, Vol. 19 (2001): 159.

[121] Cf. R.J. Castillo Lara, "La difesa dei diritti nell'ordinamento canonico", in *Il diritto alla difesa nell'ordinamento canonico. Atti del XIX congresso canonistico Gallipoli – Settembre, 1987* (Studi Giuridici 18), (Vatican City: Libreria Editrice Vaticana, 1988), xi; M.J. Arroba Conde, "La nullità insanabile della sentenza per un vizio attinente al procedimento (*1620, 7°*)", in *'La querela nullitatis' nel processo canonico* (Studi Giuridici 69), (Vatican City: Libreria Editrice Vaticana, 2005), 159; E.B.O. Okonkwo, *L'istruzione della causa di nullità matrimoniale fra il diritto e la prasi giudiziale*, 150.

jurisprudence[122], opine that only if the acts, kept under secrecy, influences prevalently the decision of the judge, then it leads to nullity of the sentence for it violates the right of defence. Moreover, if the judge withholds certain acts from the publication and arrives at moral certitude based on those withheld acts, he will publish an unjust sentence and such mentality of the judge neglects the *salus animarum* of the parties.[123]

8 THE RIGHT TO PROPOSE ADDITIONAL PROOFS

The marriage nullity case comes to its conclusion when adequate proofs have been collected and the acts are published to the parties or to their advocates (cf. cann. 1598-1599). After the inspection of the acts, the parties may present new witnesses and proofs based on their review of the acts to rebut allegedly false claims, or to supplement, nuance or provide a context for other elements of the evidence. Llobell observes that the opportunity for presenting additional proofs helps protect the right of defence and arrive at the objective truth.[124]

[122] Cf. *Coram* Davino, 1 April 1976, 160-163; *Coram* De Lanversin, 18 December 1986, *RRDecr.*, Vol. 4 (1986): 180, n. 8; *Coram* Giannecchini, 26 March 1987, 53, n. 2; *Coram* Graulich, 13 January 2014, B.Bis 3/2014 (Unpublished); *Coram* McKay, 24 April 2015, B.Bis 53/2015 (Unpublished); Coram Arokiaraj, 13 December 2017, B.Bis. 133/2017 (Unpublished); Id., 30 May 2012, 253, n. 9: "Praeterea in parte in facto sententiae primi gradus ample lateque de relatione peritali loquitur; ex tenore expositionis argumentorum seu motivorum, quibus sententia affirmativa innititur, evincitur relationem peritalem in casu fundamentum constituisse pro eadem sententia. Tribunal primi gradus aliis verbis relationem peritalem sub secreto positam in parte in facto memoravit atque ipsa relatio certitudinem moralem in iudicibus efformavit. Sententia innititur in peritia quae numquam convento nota fuit et ipsi viro possibilitatem contradicendi et sese defendendi a Tribunali primae curae negata est. Vit conventus animadvertere nequivit super actis quae Tribunal adhibuit in sententia ideoque suum ius defensionis exercere. Hod secumfert nullitatem insanabilem sententiae ob ius defenionis denegatum"; This sentence is translated and published by A. Mendonça in *Philippine Canonical Forum* 15 (2013): 245-254: The argument part of the judge of the first instance tribunal reiterated the expert's report in the sentence and arrived at the moral certitude based on this report. However, this expert report was placed under secrecy during the publication of the acts. Therefore, the expert's opinion, on which the sentence is founded, is not published to the respondent and thereby denied the respondent the possibility of contradicting and defending himself. Hence, this causes the irremediable nullity of sentence due to the denial of the right of defence.

[123] Cf. E.B.O. Okonkwo, *L'istruzione della causa di nullità matrimoniale fra il diritto e la prasi giudiziale*, 152.

[124] Cf. J. Llobell, *I processi matrimoniali nella chiesa*, 218.

After the conclusion of the case, the judge may admit new witnesses. Can. 1600 §1 (cf. *DC* art. 239) makes provision for admitting new proofs in marriage nullity cases when there is a grave reason for doing so, even if one of the parties has objected to the proposal of admitting new evidence. The grave reasons could be that a witness, who has known the parties well due to his/her profound inter-personal relationship, has not been heard before. It involves inevitable and weighty information about the contested matter. In such a case, the judge should consult with the parties on the matter, giving adequate care to remove all danger of fraud or subornation. If the testimonies of the new witnesses may help the judge to arrive at the truth about the contested matter, then he/she can propose other witnesses without which the resulting sentence would be unjust due to false information or fraudulent testimonies.[125] The judge does not have the option of publication regarding evidence after the conclusion of the case in accordance with cann. 1598 §2 and 1600 §3 (cf. *DC* art. 236) which require its publication. If such additional new evidence contains any significant shedding of light on the issues of the case, respect for the right of defence would lead the judge to publish the newly acquired acts.[126] Read clearly states that if the relevant proofs have been adduced, it is necessary for publication to take place in order to respect the right of the parties.[127] Therefore, the parties must be informed of any new evidence that has been introduced and must be granted adequate time to become acquainted with this new evidence and to defend themselves against it, if they wish.

9 ACTS *SUB SECRETO* CANNOT MOTIVATE THE DECISION

Llobell observes:

> This particular act of which the norm speaks, must not however be "*decisorio*," i.e., decisive for the sentence. This means that the court could equally reach the same decision even if the aforementioned act had not been produced or did not exist at all. If the act in question has an important relevance for the decision-making purpose, it cannot be kept secret to the parties without thereby violating their right of defence.[128]

M.J. Arroba Conde also reiterates that the acts *sub secreto* cannot be used to motivate the sentence or to reach the *certitudo moralis*, since any necessity of the acts placed under secrecy may compromise the integrity of the right of defence of the parties.[129] P. Bianchi observes, "the acts, which are kept under secrecy, cannot be used in the motivation of the sentence."[130] Rotal judges, Erlebach and Giannecchini, also opine that "the nullity of the sentence can take place because of the denial of the right of defence (as a violation of natural law), only if the publication of all the deeds of the trial or at least of the acts on which the sentence is based is missing."[131] In another Rotal sentence delivered in 2019, Erlebach categorically states

[125] Cf. P.R. Lagges, "The Pastoral Work of Judges According to Paul VI, The Code of Canon Law and *Dignitas Connubii*", in V.G. D'Souza (ed), *In The Service of Truth and Justice*, (Bangalore: Centre of Canon Law Studies, 2008), 339.

[126] Cf. C.A. COX, "Commentary on can. 1598", in J.P. Beal – J.A. Coriden – T.J. Green (eds), *New Commentary on the Code of Canon Law*, 1712; J.J. G. Faílde, *Tratado de Derecho procesal Canónico*, (Salamanca: Universidad Pontificia De Salamanca, 2005), 311-314.

[127] Cf. G. Read, "Publication of the New Proofs After Publication of the Acts", in F.S. Pedone *et alii* (eds), *Roman Replies and CLSA Advisory Opinions 2004*, (Washington, CLSA, 2004), 175.

[128] J. Llobell, *I processi matrimoniali nella chiesa*, 221: "L''atto' di cui la norma parla non deve tuttavia essere 'decisorio', ossia determinante per la sentenza, nel senso che il tribunale potrebbe ugualmente raggiungere la stessa decisione anche se il suddetto atto non fosse stato prodotto o non esistesse in assoluto. [...] se, poi, l'atto in questione conservasse un'importante rilevanza ai fini decisori non potrebbe essere tenuto segreto alle parti senza così violare il loro diritto di difesa."

[129] M.J. Arroba Conde, "La nullità insanabile della sentenza per un vizio attinente al procedimento", in '*La querela nullitatis' nel processo canonico (1620, 7')*", 159: "L'atto segretato non (può) essere utilizzato dal giudice, non già per motivare la sentenza, ma nemmeno per raggiungere la certezza morale, in quanto l'eventuale necessità dell'atto posto sotto segreto per la decisione, comprometterebbe l'integrità del diritto alla difesa delle parti."

[130] P. Bianchi, "Commento a un canone. La publicazione degli atti di causa: Can. 1598", in *Quaderni di Diritto Ecclesiale* 12 (1999): 89: "L'elemento di prova posto sotto segreto non possa essere utilizzato nella motivazione dell sentenza"; cf. C. Papale, *I processi. Commento ai canoni 1400-1670 del Codice di Diritto Canonico*, (Vatican City: Urbaniana University Press, 2017), 331.

[131] G. Erlebach, *La nullità della sentenza giudiziale 'ob ius defensionis denegatum' nella giurisprudenza Rotale*, (Studi Giuridici 25), (Vatican City: Libreria Editrice Vaticana, 1991), 262: "La nullità della sentenza può avere luogo a motivo del negato diritto di difesa (in quanto violazione del diritto naturale), solo se viene a mancare la pubblicazione di tutti gli atti del processo o almeno degli atti sui quali si appoggia la sentenza"; cf. *Coram* Giannecchini, 26 March 1987, 53, n. 2: "Quoties enim probationes in toto ad normam legis (cf. can. 1598 §1) non publicantur aut alteri parti, praeter culpam, etiam partialiter secretae manserint, sententia in eis fundata vitio nullitatis ex defectu legitimae defensionis laborat."

that the sentence becomes null only when the proof, kept under secrecy, becomes an essential or prevalent element for the decision of the cause.[132]

CONCLUSION

It must be remembered that the canonical trial is a search for truth with *certitudo moralis*. The *contradictorium* is indispensable to a trial and the publications of the acts protects and enables it and thereby guarantees the natural right of defence. The restrictive clause for withholding the acts in can. 1598 cannot be blindly applied at the detriment of right of defence since the existential features of each case is different. Obviously, in his allocution to the Roman Rota, Pope John Paul II underscores the restrictive character of the exemption to the publication of the acts enshrined in this canon. He also warns that this exemption must always be properly and faithfully interpreted lest an exemption become the general rule. He emphasizes that "it would be a distortion of the norm of law and also a grave error of interpretation, if the exemption is to become the general rule and one must, therefore, abide faithfully by the limits indicated in the canon."[133] The undue extension of the discretionary power of the judge to withhold the full acts may endanger subjective rights, depriving the party of the capacity to contradict, explain, take an exception to, or draw a different conclusion with regard to the proofs.

[132] Cf. G. Erlebach, 21 November 2019, B. Bis 143/2019, n. 3 (unpublished): "Nihil interest si hoc fit inadvertentiae causa, vel iudex non permittit publicationem alicuius medii probationis praeter condiciones in secunda parte can. 1598, §1 statutas, vel pars manet sine advocato. Hac in hupothesi, sub aspectu obiectivo consequitur violatio iuris defensionis partis, cui facta non est integra publicatio actorum nondum notorum, ast non eo ipso sententia fit nulla. Nullitatis sententiae, tali in casu, ob violatum ius defensionis, datur solummodo si ex probatione, quae secreta mansit, tribunal deprompsit elementum probatorium fuit praevaentis ponderis pro decisione capta, quod ordinarie ex motivis in facto sententiae cognosci potest, prae oculis habitis omnibus causae adiunctis ut, ex. gr. Ratione non peractae integrae publicationis actorum vel aspectu subiectivo iuris defensionis vel denique aspectu publico iuris defensionis seu ipso principio contradictorii, necnon praesumptione validitatis sententiae donec contrarium invicte probetur."

[133] John Paul II, Allocution to the Roman Rota (26 January 1989), in *AAS* 81 (1989): 924, n. 6: "Che sarebbe uno stravolgimento della norma, nonché un grave errore d'interpretazione, se si facesse della eccezione la norma generale. Bisogna perciò attenersi fedelmente ai limiti indicati nel canone"; English transl. in W.H. Woestman (ed.), *Papal Allocutions to the Roman Rota 1939-1994*, (Bangalore: Theological Publications in India, 2003), 206.

Ultimately, the judgement of the judge which pertains to the status of the parties also concerns the *salus animarum* of the people. In dealing with the matrimonial cases, the judge should meticulously pay attention to the canonical provision for publication of the acts, thereby maintaining the right of defence intact, albeit the circumstances would demand the withholding of some of the acts. In withholding a given act from publication, care must be taken that the parties are adequately informed to provide for the *contradictorium*; on the other hand, slavish attention to the right of defence must not prevent the judge from withholding some act if there is a clear and very grave danger. This significant requisite for calibration demonstrates one of the characters of the procedural law of *CIC* 1983: the increased discretionary power of the judge. Any other blind and legalistic application of the norm does not serve the purpose of the *ius vigens*, i.e., *salus animarum*, the supreme law of the Church.

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